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No. 312

In the Supreme Court of the United States

OCTOBER TERM, 1969

JOEL SIMON MEYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1969. A petition for rehearing was denied on May 5, 1969. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to July 3, 1969, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's refusal to submit to induction was excused by a lack of warning as to the consequences of his act.

2. Whether the giving of the "Allen" instruction to the jurors was proper.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on one count of a two count indictment which charged the failure to report for and submit to induction (50 App. U.S.C. 462(a)).[1] On May 17, 1968, he was sentenced to four years' imprisonment (C.A. 17, p. 10).[2]

1. Petitioner was ordered to report for and submit to induction at Fort Hamilton, New York, on May 4, 1967 (1 R. 69, 72). He was given a personal history statement form to fill out and submit at that time (1 R. 88-89). On May 4, petitioner reported prior to 7:30 a.m., and commenced passing out anti-Vietnam war literature (1 R. 127-129). The enlisted man in charge of the processing room asked petitioner to stop. Petitioner replied that he was a civilian, not subject to military orders (1 R. 129), and that the other registrants "should not go in the Army" (1 R. 130). The processing of the other registrants could not commence

[1] Petitioner was acquitted on the other count which charged that his conduct at the induction station had hindered and interfered with the administration of the Selective Service.

[2] "C.A." refers to the one volume court of appeals exhibits; "R." preceded by the volume number refers to the three volume trial transcript, consecutively paginated.

because of petitioner's insistence on his "right" to distribute the literature and because of the hostility of his audience (1 R. 130–131). When two military policemen arrived, they found petitioner making a speech (1 R. 146). Petitioner was asked to sit down (1 R. 142, 146). Petitioner replied that he was a civilian, that the military police had no authority over him and that he wanted "to talk to the boys" (1 R. 146–147, 155). Petitioner was offered the opportunity to leave voluntarily (1 R. 147). He responded by kicking and shouting (1 R. 147). Two more military policemen were called. After a total elapsed time of approximately forty-five minutes, petitioner, shouting obscenities, was dragged out of the building (1 R. 146–148, 2 R. 200–201, 211–213). Shortly afterwards, petitioner was escorted off the post (1 R. 149). Petitioner's eviction from the post occurred at approximately 8:30 a.m. (1 R. 141–142, 148). The induction ceremony, after completion of all processing, would have occurred between 3 and 4:30 p.m. (1 R. 121).

Petitioner's signed personal history statement which he submitted to the Army on May 4 (1 R. 83, 107) contained the following statements: "I refuse to participate in the genocidal war being waged by the United States government against the Vietnamese people * * *. The draft is an instrument of slave-labor. To submit to the draft is to risk one's life and to offer to serve as an accomplice to war crimes * * *" (1 R. 93–94).

2. The jury received the case shortly before the start of the noon-hour on April 5. Before going to lunch, the jury asked for an inter-office memorandum

between the induction station and the local draft board relating to contemplated further processing of petitioner. The court declined to furnish this memorandum since it had not been introduced in evidence (3 R. 282–286).[3] The jury returned from lunch at approximately 2:15 p.m. About two hours later, the jury sent a message to the court, stating "Count 1 and 2 hopelessly deadlocked, vote 11 guilty, 1 not guilty" (C.A. 17, p. 2–3). The court had the jury assembled and advised them of the desirability of reaching a verdict. After some prefatory remarks of its own (Pet. App. 7a), the court gave the instruction approved by this Court in *Allen* v. *United States*, 164 U.S. 492, and asked the jurors to continue their deliberations (3 R. 289–291). At 4:30 p.m. the jury returned with a verdict of guilty as to the failure-to-submit-to-induction count, and not guilty as to the other count (3 R. 292–293).

ARGUMENT

1. Army regulations (see Pet. App. 11a) provide that a registrant who has reported for induction, but refuses to take the ceremonial step forward that constitutes the final step in the process of induction, shall be removed from the group of inductees and given a warning as to the possible consequences of his refusal. Petitioner argues he was also entitled to such a "last clear chance" warning (Pet. 5–7). The Army regulations, however, can have no application to a disruptive registrant like petitioner who makes it impossible for

[3] The jury was alerted to the existence of this memorandum by a reference to it contained in an exhibit that had been received in evidence.

the Army to start processing him for induction. See *United States* v. *Mansavage*, 178 F. 2d 812, 818 (C.A. 7), certiorari denied, 339 U.S. 931; *United States* v. *Collura*, 139 F. 2d 345 (C.A. 2). Cf. *Service* v. *Dulles*, 354 U.S. 363. The duty to report for induction in accordance with the draft board's order includes the duty to submit to induction. Refusal to do so violates the Selective Service laws as clearly as does the refusal to report at all. *Estep* v. *United States*, 327 U.S. 114. Petitioner's offense was complete when he refused to cooperate with the induction station personnel (1 R.142) and insisted on his right to disrupt the proceedings. Since petitioner's own conduct necessitated his removal, making it impossible to process him at all, the final step warning was not required. Nor does petitioner's case present a conflict with *Chernekoff* v. *United States*, 219 F. 2d 721 (C.A. 9). There it was held that the final induction ceremony must be followed "unless the selectee himself makes it impossible" (219 F. 2d at 725). Here the record shows (and petitioner does not dispute the fact) that petitioner deliberately sought to make it impossible for the Army to start processing him for induction.

2. The record supports the determination of the court of appeals that the giving of the *Allen* charge (*Allen* v. *United States*, 164 U.S. 492) was not reversible error (Pet. App. 7a–8a). The pre-lunch deliberative session of the jury had been brief and had resulted in a request for an exhibit that was not in evidence. It was only after the court declined to furnish the exhibit, and after the luncheon recess, that the jury made a productive effort to reach its verdict.

The issue as to Count 2 was of some complexity since it involved the question whether the interference by petitioner had been with the Selective Service system, as charged, or solely with military personnel (2 R. 220). When, after only two hours of afternoon deliberation, the jury reported it was hopelessly deadlocked, the trial court acted within its discretion in urging the jury to continue their deliberations. The trial proper had taken up two days of court time. Petitioner had no right as a matter of law to a mistrial after such brief deliberative sessions on the third day. *Burrup* v. *United States,* 371 F. 2d 556 (C.A. 10), certiorari denied, 386 U.S. 1034; *United States* v. *Barnhill,* 305 F. 2d 164 (C.A. 6), certiorari denied, 371 U.S. 865.

No federal court that has considered the question has held that the giving of an *Allen* charge is reversible error. *E.g., Fulwood* v. *United States,* 369 F. 2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934; *United States* v. *Rao,* 394 F. 2d 354, 356 (C.A. 2), certiorari denied, 393 U.S. 845. While the Third and Seventh Circuits have ordered that henceforth the *Allen* charge should be modified, *United States* v. *Fioravanti,* No. 17398, C.A. 3, decided June 16, 1969, petition for certiorari filed *sub nom. Panaccione* v. *United States,* No. 333, this Term; *United States* v. *Brown,* No. 16772, C.A. 7, decided June 6, 1969, petition for certiorari filed, No. 551 Misc., this Term, in both cases the court affirmed the convictions, finding that the giving of the *Allen* charge did not violate the defendant's rights. The fact that two circuits have determined to order a modification of the *Allen*

charge in the exercise of their supervisory power does not create a conflict requiring review by this Court.

No prejudice resulted from the voluntary disclosure by the jury as to how it was divided. The court instructed the jury that it "had no purpose to ask and indeed does not have the right to inquire as to how you stand." (3 R. 289). The judge had made it clear that "under no circumstances must any juror yield his conscientious judgment" (see Pet. 7a).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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